LIBRARY
SUPREME COURT. U. S.

Office-Supreme Court, U.S.
FILED
SEP 27 1968
JOHN F. DAVIS, CLERK

No. 577

In the

Supreme Court of the United States

OCTOBER TERM, 1968

JOSEPH PAUL GLIMCO and
LENA GLIMCO,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

EDWARD J. CALIHAN, JR.
53 West Jackson Blvd.
Chicago, Illinois 60604
Attorney for Petitioners

The Scheffer Press, Inc.—ANdover 3-6850

INDEX

	PAGE
Opinion Below	1
Jurisdiction	2
Statute Involved	2
Questions Presented	2-3
Statement of the Case	3-14
Reasons for Granting the Writ	15
Conclusion	22
Petitioners' Appendix:	
A. Opinion, United States Court of Appeals	1a-6a
B. Order Affirming	7a
C. Order Denying Rehearing	8a

Authorities Cited

Cases

Commissioner v. *Tellier*, 383 U.S. 687 ..... 15, 17, 19, 21

Gideon v. *Wainwright*, 372 U.S. 335 ..... 3, 15

John v. *Zerbst*, 304 U.S. 458 ..... 3, 15

United States v. *Gilmore*, 372 U.S. 39 ..... 2, 15, 16, 19

Statute and Text

26 USC (1964 Ed.) Section 162 ..... 2, 15

Criminal Justice Act, 18 U.S.C. 3006(a) 3, 15, 21

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No.

JOSEPH PAUL GLIMCO and
LENA GLIMCO,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

To The Honorable The Chief Justice and Associate Justices of the Supreme Court of the United States:

The Petitioners, Joseph P. Glimco and Lena Glimco, pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit affirming the decision of the Tax Court of the United States entered on July 20, 1967.

OPINION BELOW

The opinion of the Court of Appeals is not yet officially reported. It is printed in the Appendix to this Petition. (App. A., p. App. 1).

JURISDICTION

Judgment of the Court of Appeals was entered on June 19, 1968 (App. B, p. App. 7a). A timely petition for rehearing was denied on July 9, 1968 (App. C, p. App. 8a). The jurisdiction of this Court is invoked under 28 U.S.C., Sec. 1254(1).

STATUTE INVOLVED

26 U.S.C., (1964 Ed.), Section 162:

> Trade or business expenses.
>
> (a) *In General.*—There shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business * * *.

QUESTIONS PRESENTED

1. Did not the Court of Appeals err in holding that the Hobbs Act indictment returned against a Teamster Union official did not arise in connection with his profit seeking activities?

2. Is cash-in-hand the only measure of "profit-seeking activities" as defined in *United States* v. *Gilmore* (372 U.S. 39):

> "The principle we derive from these cases is that the characterization, as 'business' or 'personal', of the litigation costs of resisting a claim depends on whether or not the claim arises in connection with the taxpayer's profit seeking activities"

and, if there is no immediate, demonstrable "cash-in-hand", is the expense automatically "personal" rather than "business"?

3. Is there "Equal Justice under Law" when under the Criminal Justice Act attorneys' fees are paid on

behalf of indigent persons without any claim by the Internal Revenue Service that such sums are income to indigents, when in the case at bar where a financially able labor union paid the attorney's fees for one of its officers charged with a Hobbs Act violation, said amounts are assessed as additional income on which a fraud penalty was asserted?

4. Will the Courts impose an additional tax penalty on financially able defendants by refusing a deduction in such cases, particularly in the light of *Johnson* v. *Zerbst*, 304 U.S. 458; *Gideon* v. *Wainwright*, 372 U.S. 335; and more particularly the Criminal Justice Act. (18 U.S.C. 3006(a))

STATEMENT OF THE CASE

In the Tax Court, the Petitioner Joseph P. Glimco filed a petition for a redetermination of deficiencies asserted by the Commissioner of Internal Revenue for the taxable years 1954 through 1957.[1] On the three issues involved, the Tax Court decided in favor of the Commissioner. Those issues were (1) do the legal fees and expenses, totaling approximately $125,000, paid by Teamsters Local 777 to defend Taxpayer in a Hobbs Act prosecution, constitute income to Petitioner or are they deductible as ordinary and necessary business expenses; (2) whether his cost basis for real property at 1215 North Oak Park Avenue, Oak Park, Illinois, was overstated; and (3) whether certain dividends were taxable to him or his children.

---

[1] Petitioner's wife, Lena Glimco, is also a party but only by virtue of filing joint returns with her husband during the taxable years in question.

The United States Court of Appeals for the Seventh Circuit affirmed the Tax Court decision. Petitioner, however, seeks review in this Court only as to legal fees and expenses.

The petitioner contended that the expenditure of said sums was a union expense or a gift which was authorized and ratified by the general union membership pursuant to resolution. But more than this, the petitioner contended that in the event the amounts were deemed to constitute income to him, then he was entitled to a deduction from his gross income of said amounts as ordinary and necessary expense paid or incurred, during the years involved, in the carrying on of petitioner's trade or business.

The first witness for the petitioner was Frank J. McGarr, (R. 39), who testified that he has been an attorney admitted to practice in the State of Illinois, since 1950. From 1954 to 1958 he was, for the first three years, Chief of the Criminal Division of the U.S. Attorneys office and thereafter First Assistant United States Attorney. The witness also testified that he has been on the faculty of Loyola University School of Law, teaching the subjects of criminal law and admiralty law. McGarr testified that he was the prosecutor in the case entitled *United States of America* v. *Joseph Paul Glimco.* He identified a record, Petitioner's Exhibit 10, as being the trial transcript of testimony in that case.

McGarr testified that at the time of the presentation of the Government's case that Mr. Glimco was employed by Local 777. McGarr was specifically asked whether his presentation of the case against him extended beyond his position in the Taxi Cab Local. McGarr answered that it did. (R. 42). He testified: "It was the Government's theory in that case that Mr. Glimco's position and influence in the Teamsters Union enabled him to dominate the

transportation situation on the poultry market with regard to several locals that were involved in transportation such as—a few locals such as for example Egg-handlers". It included, according to Mr. McGarr; Local 703, the commission drivers who were the market drivers; Local 705, the truck drivers and platform workers; Local 710 the over-the-road haulers of dressed birds; and Local 731, the union that handles the scavengers.

The witness testified that not only was the petitioner an official of the Taxi Cab Drivers Union, but that he was a member of the Joint Council of Teamsters. McGarr testified that the Joint Council is a policy-making council of Teamsters Unions made up of the heads of the various locals involved. His information was derived from voluminous reports of the Federal Bureau of Investigation and the Grand Jury testimony.

The next witness on behalf of the petitioner was Joseph Coca. Joseph Coca testified that he was an officer of Teamsters Local 777 until July 1, 1965, when he retired. On October 4, 1954, he was present at a meeting of Local 777 at 1213 Blue Island Avenue. (R. 44) On that evening, as President of the local, he testified that the meeting was opened at 8:00 o'clock and "due to the fact of the bad press relations that we were getting from various newspapers and throughout the country against the labor movement," a motion was brought before the membership that if any one of its officers or members was brought to Court, the local would pay the legal expenses of fighting these issues. Mr. Coca said "this is in regards to the officers and the members, that the local would stand behind the individual as a gift for the money to protect that". (*sic*) (R. 45)

The minutes of the meeting were in evidence as Joint Exhibit 6F. (R. 82) The witness testified that so far

as he was concerned being present there and having the flavor of the meeting and everything else that the expenditure of these monies was *a gift by the union* to anyone in difficulty with the law as a result of the anti-labor wave of newspaper publicity.

The next witness who testified was the petitioner, Joseph Paul Glimco, who stated that he was presently the President of Local 777 of the International Brotherhood of Teamsters; that he is 57 years of age and has been in the labor movement for approximately 30 years. (R. 51) The petitioner testified that his first connection with organized labor was as a chauffeur for William J. Hanley, who was Secretary and Treasurer of Local 703 of the International Brotherhood of Teamsters. This Local's jurisdiction covered everything on the market as far as trucking was concerned, including inside help, produce houses and poultry houses. The "market" was described by the petitioner as the South Water Street Market, Fulton Street Market, Randolph Street Market, and the Market at 78th Street and State Street in Chicago, Illinois. The "market" as described by the petitioner was produce, fruits, vegetables, poultry, fish, which arrived principally in trucks. Materials would come in from the farms by truck and were purchased and delivered to various grocery stores in Chicago, Illinois.

The petitioner testified that he was the chauffeur for Mr. Hanley a number of years until he accepted a position with the Poultry Handlers Union on the Fulton Street Market. At the time he knew Hanley, Hanley was the "boss of the market." (R. 52) Hanley's union was the principal union that moved most of the commodities on the market. While the petitioner was on leave as a chauffeur from Mr. Hanley, he accepted a position with

the Poultry Handlers Union, Local 650, Meat-cutters affiliate of the AFL-CIO union. After leaving the Poultry Handlers, he became associated with Local 777, International Brotherhood of Teamsters. He was also a member of Local 703 until he went with Local 777 in 1937. The Charter of Local 777 was secured by Mr. Hanley and the petitioner.

"After we secured a Charter in the Teamsters for them, Mr. Hanley suggested that I go over and help the new union administer their affairs. I spent a good part of the morning at Local 777 and from there I would go over on to the market where we met in a restaurant at Fulton and Aberdeen, on the southeast corner." The petitioner testified that he would meet various labor persons from all around the city and various employers on the market. At the time he was an assistant business agent with Local 777, and later became a trustee. After he became a trustee, he then became a member of the Joint Teamsters Council No. 25. This was around 1944. During the period covered by the indictment, 1944 to 1954, to the best of the petitioner's recollection he was a trustee of Local 777 and a member of the Joint Teamsters Council No. 25.

As a trustee in one of the affiliate locals, such as 777, he had a voice, as a delegate to the Joint Council, in the policy making of the Council, which is composed of all of the Teamster locals in the city of Chicago. At that time there were approximately 42 or 43 Locals including Local 703, who were the commission drivers on the market. He knew John T. O'Brien, also known as Sandy O'Brien, who was not only head of Local 710, but a Vice President of the International Brotherhood of Teamsters in charge of the central states area of approximately 15 or 16 states. He was acquainted with the officials of

Locals 752, 727, 731, 738, 781, all of whom were active on the markets. (R. 55-56)

The petitioner testified that in connection with the employers who were named in the indictment, he was well acquainted with the M. Zimmerman Co. who conferred with him about labor matters. The petitioner consulted with Meyer Litman about labor matters for 20 or 30 years. He knew the A. F. Merman & Co. house and had many conversations with them on the market regarding labor matters. He was familiar with the family and brothers of Karston & Son and conferred quite frequently with them about labor matters during the period of the indictment. He knew the Cubel Produce Co. He knew the J. H. Hoar & Co. He also knew the Richter & Sons Co. and had conversations with them regarding labor matters. (R. 58-60) He was also familiar with the American Poultry Company, a sole proprietorship; knew a man by the name of Morris Merker; knew also O. G. Shice Co.; Edgar Friedheim, and Maurice Brothers Co., all of whom were witnesses in the criminal case. (R. 60)

All of the foregoing witnesses in the criminal case were in business on the market in produce of various kinds.

Mr. Hanley died in September of 1944 and the petitioner Glimco inherited his responsibility and position on the market. (R. 61) He was consulted by unions and employers not only about conduct on the market, but affairs around the city.

The next witness who testified for the petitioner was Barnabas Sears, who testified that he was admitted to practice law in Illinois on October 14, 1926. He was President of the Illinois State Bar Association for one year and presently the Illinois State delegate to the

American Bar Association. He is past regent of the American College of Trial Lawyers, and one of the organizers and past chairman of the Labor Relations Section of the American Bar Association and the Illinois Bar Association. (R. 73) He also held positions in other Bar Sections and activities. He was Chairman of the Joint Committee on the Judicial Article of the Chicago Bar Association and the State Bar Association for seven years that formulated, in substance, the present new Judicial Article in this State of Illinois. (R. 73)

Mr. Sears said he knew Joseph Glimco and represented him in the case of *United States* v. *Joseph Glimco* tried in the United States District Court for the Northern District of Illinois. During the course of representing him, he personally interviewed witnesses, including the employer witnesses.

At this point, the Tax Court asked the following question: (R. 74)

> "The Court: I don't understand that there is any contention in this case from the pleadings with respect to the reasonableness of the amounts paid as attorney's fees and expenses, is there?
> "Mr. Young: The amount?
> "The Court: Yes.
> "Mr. Young: *No, Your Honor.*"

Thereafter, the following questions and answers were made:

> "Q. Now, Mr. Sears, what was the origin of the facts and the character of the activities of Mr. Glimco that constituted the basis of your defense of the Government's case against him?
> "A. Well, the case originated in the activities of Mr. Glimco as a labor leader on the Fulton fish market here in Chicago." (R. 75)

* * *

"The Witness: Well, if I understand the question rightly, your Honor, I can only answer it by saying that my investigation disclosed that the case originated in the activities of Mr. Glimco as a labor leader on the Fulton fish market.

"Mr. Young: I would object to that, your Honor. This is the results. This is not the facts. This is the result.

"The Court: I am taking them as the basis of this witness as to the facts. They are the basis. I take it as the form and substance of his defense of this man. I don't receive the results of his investigation as proof of the fact which he enunciates as a result.

"By Mr. Calihan:

"Q. In your defense of the case against Mr. Glimco did it extend beyond his position in the taxicab local?

"A. Yes, sir.

"Q. In what respect?

"A. Well, in this respect: he was the successor to Mr. Hanley, who was the labor boss, if I may use the term, of the Fulton fish market, and it was claimed that in his capacity as a labor leader, he committed the acts complained of in the indictment.

"Q. Now, were you paid by the local union?

"A. Yes, sir." (R. 76)

* * *

"Q. What were the facts on which you based your acceptance of these fees?

"A. Well, if I may answer your question this way, Mr. Calihan. I had prior to the time I defended Mr. Glimco a fair amount of experience in the labor field. I don't know that that's responsive to your question; and if permitted, I will continue to explain what that was.

"Q. Go ahead.

"A. Well, up to the time I undertook—

"Mr. Young: I will object to this, Your Honor. I still think it is immaterial and irrelevant as to the payment from the union to Mr. Sears as to the issues here.

"The Court: I think it is extremely relevant and material.

"You may answer particularly on the position taken by the respondent in this case.

"The Witness: Well, I had represented employers in labor disputes up to this period in 1957, and from that experience and dealing with labor representations I was completely aware of the fact that you cannot compartmentalize the activities of a labor man. You cannot, for example, say that Mr. Glimco's sole activities as a labor man relate solely to his particular office then he then held in Local 777, because the first labor case I was in back in 1939 I learned that the activities of a labor leader extend far beyond the particular duties of his particular office, and speaking solely about his activities there—

"The Court: Just a minute. The answer being given is far afield of the question asked. The answer given amounts to an offer of expert opinion as to one of the several determinations to be made by this Court. They are of necessity hearsay.

"This answer is not responsive at all to your question.

"By Mr. Calihan:

"Q. Mr. Sears, knowing the question and in view of the Court's ruling, would you state to me what the fact determinations were that you made in connection with your acceptance of these fees?

"A. Well, the fact of the matter was that the union had a real interest in defending—

"Mr. Young: I object to that, your Honor. This is a conclusion and opinion as to what the union had an interest in.

"The Court: Now, he may testify to facts which he believed to be facts, whether they are or not, which influenced him to accept an attorney fee in this case from someone other than the one indicted.

"Proceed.

"The Witness: May I have the question and answer read up to the point of the objection?

"(Record read)

"The Witness: Its officer on charges that I considered basis which grew out of its activities generally as a labor leader.

"Mr. Calihan: No further questions.

"The Court: Cross-examination.

"Cross-Examination by Mr. Young.

"Q. Mr. Sears, what was Mr. Witt Hanley's position in the Fulton Street market?

"A. I didn't get that. The poultry market?

"Q. Mr. Hanley's position in the poultry market.

"A. Well, my investigation disclosed that he was the boss of the—

"Q. What do you mean by 'boss'? Was he a president of the local, or what?

"A. He was the gentleman that controlled labor relations in the Fulton fish market.

"Q. Do you know whether he was a union member?

"A. Well, I never met Mr. Hanley because he was dead at the time, but my investigation disclosed that he was a member of some Teamster Union, as I recall it.

"Q. And you say Mr. Glimco, being his successor, took over this position with that Teamster local?

"A. No, no, I didn't say that. I said he took over Mr. Hanley's general position as the so-called labor boss of the Fulton fish market.

"Q. As a boss?

"A. Well, that's what I understood it.

"Q. Did you ever represent a labor union prior to this case or a labor union official prior to this criminal case?

"A. No, sir.

"Mr. Young: That's all I have, your Honor.

"The Court: Any redirect examination?

"Mr. Calihan: No, sir." (R. 79)

Thereafter no further witnesses being offered on behalf of the respondent, the following colloquy occurred:

"Mr. Calihan: Your Honor, at this time I would like to call the Court's attention to something. Perhaps counsel for the respondent will so stipulate, but it relates to whether or not I should make this statement in the record or the Court will take judicial notice of the record in another case docketed in this court, No. 94551.

"Mr. Young: I would not so stipulate and vigorously oppose it.

"Mr. Calihan: Well, I would like to at least represent to the Court that the records of this court in Docket No. 94551 will show notice of deficiency having been sent by the respondent to the Taxicab Drivers Local 777, International Brotherhood of Teamsters, alleging that the payment of these legal fees which are in question here by the said union were improper payments by the union and that the said case was settled on the basis that the tax returns filed by the said local were proper and that on January 13, 1966, a decision of this court was entered finding no deficiency.

"The Court: I, of course, take judicial notice of any of the files and records of this court, but the facts you are seeking to get into the record are totally irrelevant, immaterial to any issue in this case.

"I take it that your contention is that the Commissioner is estopped in some way by taking an inconsistent position.

"Mr. Calihan: Not estopped, your Honor. I merely want to demonstrate by this particular piece of evidence before the Court that at least so far as the union was concerned, that it was a proper deduction.

"The Court: I don't see as it would make any difference at all whether it was a proper deduction in some other case.

"I will take judicial notice of any of the files and records of this court.

"Mr. Young: Your Honor, by 'files of the court,' does your Honor mean pleadings, and things of that nature?

"The Court: Yes.

"Mr. Young: You will take judicial notice of them?

"The Court: Yes, I will.

"Mr. Calihan: On that basis the petitioner rests.

"The Court: *Do you have testimony to offer for the respondent?*

"Mr. Young: *No, your Honor.*

"The Court: *You rest at this point?*"

"Mr. Young: *Respondent rests.*" (R. 79-81)

(Emphasis supplied)

REASONS FOR GRANTING THE WRIT

1. The Court of Appeals for the Seventh Circuit has rendered a decision in conflict with applicable decisions of this Court, in *United States* v. *Gilmore,* 372 U.S. 39 and *Commissioner of Internal Revenue* v. *Walter F. Tellier, et ux.,* 383 U.S. 687.

2. This Court should exercise its jurisdiction to decide an important question of Federal law, which has not been, but should be decided by this Court. Does not the teaching of *Johnson* v. *Zerbst,* 304 U.S. 458, *Gideon* v. *Wainwright,* 372 U.S. 335 and the Criminal Justice Act compel the conclusion that the Courts may not impose an additional penalty on financially able defendants accused of crimes by refusing a tax deduction for their defense.

1.

The Court of Appeals for the Seventh Circuit has stated in its opinion that the taxpayer's activities giving rise to legal expenses must be in connection with his "trade or business" within the meaning of Section 162(a) of the Internal Revenue Code (26 U.S.C., Paragraph 162(a)). The Court says, "That provision must be narrowly construed," and quotes from *U.S.* v. *Gilmore* (372 U.S. 39). In the *Gilmore* case, as this Court stated, (at p. 46):

> "The pivotal issue in this case then becomes: was this part of respondent's litigation costs a 'business' rather than a 'personal' or 'family' expense?" *United States* v. *Gilmore,* 372 U.S. 39, 46.

The Supreme Court then declared:

> "It is the origin of the liability out of which the expense accrues or the kind of transaction out of which the obligation arose which is crucial and controlling."

In the *Gilmore* case, this Court said that expenditures made in connection with a marital litigation could hardly be deemed expenses incurred in the carrying on of a trade or business. And so it is with most of the cases on this subject. There is a clear line of demarcation between what is business and what is personal. In the case at bar, however, the taxpayer's activities as a labor leader on the poultry market were clearly not personal, neither marital nor extra-curricular. They were inextricably tied in with his activities as an official of Local 777. It was his office in Local 777 and the preëminence he enjoyed in the labor movement that gave rise to his activities on the poultry market. All evidence of his market activities were in the area of labor dispute, wage-hour, and other related union-employer relations. Clearly they were not personal. These activities were all of a business nature.

The narrow construction which the *Gilmore* case speaks of, must be equated with what the Supreme Court said at page 44 of its opinion.

> "For income tax purposes, Congress has seen fit to regard an individual as having two personalities: 'one is (as) a seeker after profit who can deduct the expenses incurred in that search; the other is (as) a creature satisfying his needs as a human and those of his family but who cannot deduct such consumption and related expenditures.'" *United States* v. *Gilmore*, 372 U.S. 39, 44.

For the Court of Appeals to say that the taxpayer's activities in the afternoon in no way bore relation to his profit activities is to ignore reality. The criminal charges against the taxpayer found their source in his business activities as a labor leader, and none other. The Courts below have failed to even suggest the criminal defense

arose from his "human or family needs." This case falls squarely within *Commissioner* v. *Tellier,* 383 U.S. 687.

The charge which was leveled against the petitioner carried a sentence of 20 years. The Landrum-Griffin Act further provides that upon conviction of such an offense the person so convicted cannot hold union office for a period of five years. While this provision was passed subsequent to the offense charged, if the taxpayer had been convicted, the passage of the Landrum-Griffin Bill would have barred him from holding office for a period of five years at the conclusion of his sentence. The Landrum-Griffin Act was retrospective in application; and most certainly reflects an understanding by Congress of the business nature of the charged activities. How could his human or family needs lead to congressionally restricted employment?

In the case below, petitioner pointed out to the United States Court of Appeals for the Seventh Circuit that the Tax Court in Docket No. 94551 permitted Local 777 to retain its exempt status under Section 501(c)(5) of the Internal Revenue Code (26 U.S.C. 501(c)(5)). Under that settlement, Local 777 was allowed to take certain deductions in 1956 and 1957, including the legal fees and expenses paid to the petitioner's counsel for the defense of the Hobbs Act case.

The Court of Appeals apparently misunderstood the purpose of the petitioner in referring to the settlement by the Respondent Commissioner of Internal Revenue of the proceedings against Local 777. The Petitioner did not urge that such a settlement "created estoppel". The argument was advanced to demonstrate the complete and utter inconsistency of the positions taken by the Respondent below. In the case of the taxpayer Glimco the legal

fees were ruled not an ordinary and necessary business expense. In the case of Local 777, the same legal fees were conceded to be proper deductions and *allowed* as ordinary and necessary business expense to the union. How the donor of these funds can be held to have properly deducted them as a business expense and the donee held to have improperly failed to report them as additional income, is not explained by either the Commissioner or the Court below.

The positions taken are flatly contradictory, and beyond explanation. It is somewhat akin to saying that a sum of money given as a bribe is not a bribe to the bribor, but it is a bribe to the bribee.

The Court of Appeals said that the basis for holding that the deduction was a proper union deduction was that a *Teamster Union* was concerned that its "image might be tarnished". There is nothing in the record to support that. The record *does* disclose, however, the union was concerned that due to the wave of publicity and the anti-union feeling engendered by the press and by prosecutive authorities, that its members or its officers might be subject to attack. The union, by a vote of the membership, authorized the payment of legal expenses in the event *either a member or an officer* became a casualty of such anti-union feeling. The "not guilty" verdict is itself tribute to consummation of this aim.

The true concern was for the welfare of its officers and members. The publicity which the Teamsters have received in the last decade or so could scarcely support a concern for a tarnished image.

With all due respect to the Court of Appeals for the Seventh Circuit, it is respectfully suggested that the opinion of the case at bar is flatly contrary to this Court's

decisions in *Gilmore* and *Tellier* (supra). At least, it offends the spirit of the words "origin of liability" used by this Court in its *Gilmore* decision. This Court should grant the petition for Writ of Certiorari to the Seventh Circuit because the opinion below is in conflict with two decisions of this Court.

2.

It was urged below that the Courts should not impose an additional penalty on financially able defendants charged with crime who come into the district courts to defend themselves against federal criminal charges. In *Tellier* v. *Commissioner,* the United States Court of Appeals for the Second Circuit found for the taxpayer, 342 F.2d 690. Their decision was affirmed by the Supreme Court. In said case, the issue of deductibility was before the Second Circuit sitting en banc. In a special concurring opinion, Chief Judge Lumbard with whom Waterman and Kaufman, Circuit Judges, joined, posed another problem which presents itself if legal expenses, under the circumstances here, are to be regarded as taxable income. That Court said as follows (page 696):

> "In 1938 the Supreme Court held in *Johnson* v. *Zerbst,* 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461, that counsel must be furnished an accused who is financially unable to retain his own counsel to defend him on federal charges. A few months ago Congress at long last realized that the right to counsel has little substance unless counsel is paid for his efforts and reimbursed for necessary expenses. Under the provisions of the Criminal Justice Act, 18 U.S.C. § 3006A, which became law on August 20, 1964, a defendant who is found to be financially unable to provide counsel and defray defense expenses is now entitled to have such reasonable and necessary expenses paid by the government up to specified maximum amounts.

"The assignment and compensation of counsel under the Criminal Justice Act do not depend on whether a defendant successfully asserts his innocence. Indeed, almost all of counsel's labors ordinarily must be done and his expenses must be incurred before guilt or innocence is finally established. The defendant has the right to put the government to its proof, if he so elects. His right to counsel does not depend upon whether in fact he has a defense or whether it was reasonable to contest the charges. Surely it needs no argument to support the proposition that unless a defendant has the benefit of counsel who can give necessary attention to the charges and their defense—and in cases such as Tellier's, this is usually a considerable task for conscientious counsel—he may not be in a position to make an intelligent and knowing decision as to whether or how to conduct a defense. Moreover, whether he stands trial or pleads guilty, he needs counsel who has thoroughly familiarized himself with the case and who can plead for his client in the light of such knowledge. If the compensation of counsel under the Criminal Justice Act does not depend on the success of the defense, it would seem to follow that the allowance of the deduction should not depend on the outcome in cases where the defendant is able to and does assume the financial burden of defending against criminal charges.

"In holding that a financially able defendant may deduct as 'ordinary and necessary' expenses the legal fees and expenses incurred in an unsuccessful defense, we are being consistent with a clearly evinced policy that a defendant be represented by counsel regardless of the ultimate success or failure of his defense.

"As there is no provision of the tax laws which requires a contrary result, *I agree that we should not impose an additional penalty on financially able defendants by refusing a deduction in such cases.*

> The allowance of the deduction here sought is consonant with public policy and ought to be allowed. I think the teaching of *Johnson* v. *Zerbst, supra, Gideon* v. *Wainwright,* 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963), and the Criminal Justice Act requires this result and that we are no longer bound by Burroughs." *Tellier* v. *Commissioner,* 342 F.2d 690. (Emphasis supplied)

If a person is indigent and is furnished counsel then counsel is compensated under the Criminal Justice Act. It would seem then that if a person has no money, he not only receives income but his income is tax exempt. On the other hand, a person who can afford counsel, or a person whose counsel is furnished him, as in the case at bar by a financially solvent union, is taxed to the extent that the same legal expense is considered additional income. The result is obviously contrary to Anglo-American principle of jurisprudence "Equal Justice Under Law", and equal applicability of the law. If Glimco had come before the District Court under the Criminal Justice Act, would expenditures paid in his behalf have been taxable to him as additional income? Certainly not. The import of this Court's decision is contrary to that great principle. An accused *must* not be penalized merely for his ability to pay. No other conclusion than that it is here can be drawn from the decision below.

It is respectfully urged that this Court should exercise its jurisdiction to decide this important question of Federal law. There would seem to be no compelling reason why a person accused of crime under our Federal system should be penalized for his ability to pay attorney's fees. Such a concept does not appear to be consistent with "equal justice under law". The very reasons

which ultimately compelled this Court to take the view it has toward an indigent defendant, should compel the conclusion that a financially able defendant should be no worse off merely because of his ability to pay for his defense. This case presents the important question of whether financial penalty can be imposed on the basis of the Government's wrongful accusation, as determined by petitioner's peers. That question should be decided by this Court.

CONCLUSION

Wherefore, for the above and foregoing reasons, the petitioner herein respectfully prays that a writ of certiorari be issued to the United States Court of Appeals for the Seventh Circuit in this case.

Respectfully submitted,

EDWARD J. CALIHAN, JR.,
Attorney for the Petitioner

APPENDIX

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

SEPTEMBER TERM, 1967 APRIL SESSION, 1968

No. 16469

JOSEPH P. GLIMCO and
LENA GLIMCO,
Petitioners-Appellants,

v.

COMMISSIONER OF INTERNAL
REVENUE,
Respondent-Appellee.

On Petition to Review the Decision of the Tax Court of the United States.

JUNE 19, 1968

Before CASTLE, *Chief Judge,* and SCHNACKENBERG and CUMMINGS, *Circuit Judges.*

CUMMINGS, *Circuit Judge.* In the Tax Court, Joseph P. Glimco ("Taxpayer") filed a petition for a redetermination of deficiencies asserted by the Commissioner of Internal Revenue for the taxable years 1954 through 1957.[1] On the three issues involved here, the Tax Court decided in favor of the Commissioner. Those issues are

[1] Taxpayer's wife, Lena Glimco, is also a party but only by virtue of filing joint returns with her husband during the taxable years in question.

(1) do the legal fees and expenses, totaling approximately $125,000, paid by Teamsters Local 777 to defend Taxpayer in a Hobbs Act prosecution, constitute income to Taxpayers or are they deductible as ordinary and necessary business expenses; (2) whether his cost basis for real property at 1215 North Oak Park Avenue, Oak Park, Illinois, was overstated; and (3) whether certain dividends were taxable to him or his children.

Deductibility of Legal Fees

Between June 1937 and January 1939, Taxpayer was employed by Local 650, Poultry Handlers Union, as an organizer. From 1940 through the taxable years in question, he was employed by Local 777 of the Taxicab Drivers, Maintenance and Garage Helpers Union, with jurisdiction over the taxi drivers in Chicago. From 1950 to 1958, he was a trustee of Local 777 and was *ex officio* a member of Joint Teamsters Council No. 25, the policy-making organization for over 40 Teamster locals in the Chicago area.

During the four taxable years, Taxpayer spent his mornings at the Chicago office of Local 777 and his afternoons at a restaurant in the poultry market area of Chicago. While at the poultry market, he was consulted constantly by various unions and employers concerning the conduct of the poultry market with respect to wages, hours and working conditions.

In October 1954, Taxpayer and four other individuals were indicted for violation of the Hobbs Act (18 U.S.C. § 1951). In the indictment Taxpayer was described as an agent and representative of Local 650 of the Chicago Poultry Handlers Union. No mention was made of Teamsters Local 777 or Joint Teamsters Council No. 25. He was charged with unlawfully collecting money from poultry merchants from 1944 to 1954 through "actual and threatened force, violence, and fear." Taxpayers pleaded not guilty to the indictment and was acquitted by a jury in March 1957.

The payment of Taxpayer's legal fees and expenses was authorized at an October 1954 meeting of the membership of Local 777, in part to combat press attacks being made upon Local 777.

The Assistant United States Attorney who prosecuted the Hobbs Act indictment against Taxpayer testified that the indictment concerned Taxpayer's interference with interstate commerce in the poultry market in Chicago, and that it was the Government's theory that Taxpayer's "position and influence in the Teamsters Union enabled him to dominate the transportation situation on the poultry market with regard to several locals [specifying 703, 705, 710, 731, and 738, but not mentioning Local 777] that were involved in transportation * * *."

Taxpayer's counsel in the criminal case testified that the indictment stemmed from Taxpayer's activities as a labor leader on the poultry market, and that it extended beyond Taxpayer's position in Local 777.

In the Tax Court, the Taxpayer's primary contention was that the legal fees and expenses were a gift to him by Local 777. However, the Tax Court found that Local 777 did not have a donative intent but was trying to benefit itself by mitigating press attacks resulting from the indictment. The Taxpayer does not really attack this finding, for its brief admits "that the motivation of the union [Local 777 in paying these legal fees and expenses] was to defend its image in the labor movement and the effectiveness of its members and officers as its representatives."

The Taxpayer states that the remaining issue with respect to the legal fees is a factual one to determine whether Taxpayer's activities giving rise to the legal expenses were in connection with his "trade or business" within the meaning of Section 162(a) of the Internal Revenue Code (26 U.S.C. § 162(a)). That provision must be narrowly construed. *United States* v. *Gilmore*, 372 U.S. 39, 44-45. Taxpayer admits that the deductibility of the litigation costs depends on whether or not the

indictment arose in connection with his profit-seeking activities. See *United States* v. *Gilmore, supra,* at pp. 47-48. The Tax Court denied deductibility because the indictment related to Taxpayer's ostensibly non-profit-seeking afternoon activities on the poultry market and not from his activities as a paid officer of Local 777.

In support of his argument that the legal fees and expenses are deductible, Taxpayer states that the touchstone is the origin of the liability out of which the expenses were incurred. *United States* v. *Gilmore, supra; Commissioner* v. *Tellier,* 383 U.S. 687. Even so, under Section 162(a) of the Internal Revenue Code, to be deductible, the expenses must be in connection with a taxpayer's "trade or business." The most prominent factor in determining whether a taxpayer is engaged in a trade or business is the profit motive. To establish the deductibility of ordinary and necessary expenses incurred in carrying on a trade or business, the taxpayer must "initiate or conduct the enterprise in good faith with an intention of making a profit or of producing income." *International Trading Co.* v. *Commissioner,* 275 F.2d 578, 584 (7th Cir. 1960). This record is devoid of any showing that Taxpayer conducted his poultry market afternoon activities in order to produce any income or profit. Indeed, he reported no taxable income from his poultry market activities and testified that he did not recall having received any such income, nor did he show how those activities related to his position as an officer of Local 777. Because Taxpayer has failed to show that they were related to his income-producing trade or business, the Tax Court properly concluded that these expenditures were not deductible. *Lydon* v. *Commissioner,* 351 F.2d 539, 546 (7th Cir. 1965); *Lamont* v. *Commissioner,* 339 F.2d 377 (2d Cir. 1964); *White* v. *Commissioner,* 227 F.2d 779 (6th Cir. 1955), certiorari denied, 351 U.S. 939. Moreover, there was no showing that Taxpayer pursued his poultry market activities as part of his employment with Local 777 or to serve its interests. Therefore, the expenditures could be considered as per-

sonal rather than business. *Vernon* v. *Commissioner*, 286 F.2d 173 (9th Cir. 1961).

Taxpayer also relies on the settlement of Tax Court Docket No. 94551, permitting Local 777 to retain its exempt status under Section 501(c)(5) of the Internal Revenue Code (26 U.S.C. § 501(c)(5)). Under that settlement Local 777 was allowed to take certain deductions in 1956 and 1957, including legal fees and expenses paid to Taxpayer's counsel for the defense of the Hobbs Act case. The Tax Court took judicial notice of the settlement but considered it irrelevant and immaterial and as creating no estoppel. There having been no determination of the merits in Docket No. 94551, the doctrine of estoppel by judgment is inapplicable. *United States* v. *International Building Co.*, 345 U.S. 502, 506. Local 777 was interested in defending Taxpayer in order to protect its own image. Although the deductions may have been proper as to Local 777, that does not show that any Local 777 activities were involved in the poultry market case against Glimco. The union could fear that its image might be tarnished by one of its officers' allegedly illegal activities having no direct connection with Local 777 itself.

Cost Basis of Real Property

In 1956, Taxpayer sold real property in Oak Park for $40,000, claiming a cost basis of $39,050. The Commissioner determined that Taxpayer's cost basis was actually only $30,901.60.

To support the higher cost basis claimed, Taxpayer testified that he paid $8,692 to various persons for land, windows, kitchen tile and landscaping. However, Taxpayer kept no written records of these payments and offered no receipts or testimony from the payees corroborating his claim. He had no checking account and admitted that his memory is poor.

In rejecting the higher cost basis, the Tax Court stated that it did not believe Taxpayer's oral testimony

about these cash payments. The mere fact that his testimony was uncontradicted did not require the trier of facts to accept it. *Shapiro* v. *Rubens,* 166 F.2d 659, 666 (7th Cir. 1948). In view of his poor memory and failure to produce corroborative evidence, the Tax Court was justified in refusing to credit Taxpayer's testimony. *Perlmutter* v. *Commissioner,* 373 F.2d 45 (10th Cir. 1967); *Archer* v. *Commissioner,* 227 F.2d 270 (5th Cir. 1955).

Dividends

The Tax Court upheld the Commissioner's determination that dividends paid on American Telephone & Telegraph Company stock in 1956 and 1957 were income to Taxpayer. In opposition, Taxpayer testified that he owned no A T & T stock and to the best of his knowledge, his wife did not (except possibly one or two shares). He contended that the A T & T stock in question had been given to his children or daughter by their parents or friends. Taxpayer stated that the stock may have been in his wife's name "as a beneficiary," but that it was owned by their daughter. He insisted that although the stock may have been carried in his wife's and one of the children's names, it was the children's stock.

The Tax Court rejected Taxpayer's testimony, observing that it was not supported by testimony of his wife or children. The trial judge also noted that no stock certificates were produced or other evidence showing the names of the titleholders upon the books of A T & T. In these circumstances, the Tax Court was entitled to conclude that corroborative evidence did not exist or would not have supported Taxpayer's testimony. *Wichita Terminal Elevator Co.* v. *Commissioner,* 6 T.C. 1158, 1165 (1946), affirmed, 162 F.2d 513 (C.A. 10, 1947); *Shaw* v. *Commissioner,* 27 T.C. 561, 573, affirmed, 252 F.2d 681 (6th Cir. 1958). As with the testimony concerning the cost basis for the Oak Park real estate, the Tax Court was justified in refusing to credit Taxpayer's testimony.

The decision of the Tax Court is affirmed.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

Wednesday, June 19, 1968

Before

Hon. Latham Castle, Chief Judge
Hon. Elmer J. Schnackenberg, Circuit Judge
Hon. Walter J. Cummings, Circuit Judge

JOSEPH P. GLIMCO and LENA GLIMCO,
Petitioners-Appellants,

No. 16469

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent-Appellee.

Petition for review of a decision of the Tax Court of the United States

This cause came on to be heard on the transcript of the record from the Tax Court of the United States, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this Court that the decision of the Tax Court of the United States entered in this cause on July 20, 1967, be, and the same is hereby, AFFIRMED, in accordance with the opinion of this Court filed this day.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

Tuesday, July 9, 1968

Before

Hon. Latham Castle, Chief Judge
Hon. Elmer J. Schnackenberg, Circuit Judge
Hon. Walter J. Cummings, Circuit Judge

JOSEPH P. GLIMCO and LENA GLIMCO,
Petitioners-Appellants,

No. 16469

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent-Appellee.

Petition for review of a decision of the Tax Court of the United States

IT IS ORDERED by the Court that the petition for rehearing filed in the above entitled cause be and the same is hereby denied.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

I, KENNETH J. CARRICK, Clerk of the United States Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing Printed pages contain a true copy of opinion filed June 19, 1968 and judgment entered June 19, 1968 in

Cause No. 16469

Joseph P. Glimco and Lena Glimco v. *Commissioner of Internal Revenue,* as the same remains upon the files and records of the United States Court of Appeals for the Seventh Circuit.

IN TESTIMONY WHEREOF I hereunto subscribe my name and affix the seal of said United States Court of Appeals for the Seventh Circuit, at the City of Chicago, this 24th day of July A.D. 1968.

/s/ Kenneth J. Carrick
Kenneth J. Carrick
Clerk of the United States Court of Appeals for the Seventh Circuit.

(SEAL)

LIBRARY
SUPREME COURT, U. S.

No. 577

Office-Supreme Court, U.S.
FILED
OCT 28 1968
JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1968

JOSEPH PAUL GLIMCO and LENA GLIMCO, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,

MITCHELL ROGOVIN,
Assistant Attorney General,

HARRY BAUM,
LOUIS M. KAUDER,
Attorneys,
Department of Justice,
Washington, D. C. 20530.

INDEX

CITATIONS

Cases:	Page
Berenyi v. *District Director*, 385 U.S. 630	3
Commissioner v. *Gordon*, 391 U.S. 83	8
Commissioner v. *Tellier*, 383 U.S. 687	4, 6
Corn Products Refining Co. v. *Commissioner*, 350 U.S. 46	3
Dyer v. *Commissioner*, 352 F. 2d 948	6
Higgins v. *Commissioner*, 312 U.S. 212	3
Hirsch v. *Commissioner*, 315 F. 2d 731	6
International Trading Co. v. *Commissioner*, 275 F. 2d 578	6
Lamont v. *Commissioner*, 339 F. 2d 377	6
Putnam v. *Commissioner*, 352 U.S. 82	5
Tellier v. *Commissioner*, 342 F. 2d 690	9
United States v. *Gilmore*, 372 U.S. 39	4, 5
United States v. *International Building Co.*, 345 U.S. 502	7
White v. *Commissioner*, 227 F. 2d 779	6
Wiles v. *United States*, 312 F. 2d 574	6
Wilson v. *United States*, 376 F. 2d 280	6
Statutes:	
Hobbs or Anti-Racketeering Act (18 U.S.C. 1951)	2
Labor-Management Reporting and Disclosure Act, Sec. 504, 73 Stat. 536 (29 U.S.C. 504)	7
Internal Revenue Code of 1939:	
Sec. 23 (26 U.S.C. 1952 ed., Sec. 23)	5
Sec. 24 (26 U.S.C. 1952 ed., Sec. 24)	5
Internal Revenue Code of 1954:	
Sec. 162 (26 U.S.C. 1954 ed., Sec. 162)	1
Sec. 212 (26 U.S.C. 1954 ed., Sec. 212)	5
Sec. 262 (26 U.S.C. 1954 ed., Sec. 262)	7
Sec. 501 (26 U.S.C. 1954 ed., Sec. 501)	7
Sec. 504 (26 U.S.C. 1954 ed., Sec. 504)	7

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 577

JOSEPH PAUL GLIMCO and LENA GLIMCO, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

The question in this case is whether petitioner Joseph Paul Glimco[1] is entitled to deduct from gross income, as ordinary and necessary business expenses under Section 162(a) of the Internal Revenue Code of 1954, legal fees incurred in connection with his successful defense against federal criminal charges of extortion.

---

[1] Lena Glimco is a party to these proceedings only by reason of the filing of joint tax returns with her husband (Pet. App. 1a).

During the tax years in question (1954 through 1957) petitioner was employed as assistant business manager of the Taxicab Drivers, Maintenance and Garage Helpers Union, Local 777 (hereinafter referred to as Local 777), in Chicago. From 1950 to 1958 he was a trustee of Local 777 and *ex officio* a member of Joint Teamsters Council No. 25, the policy making organization for over 40 Teamster locals in the Chicago area. He had no labor organization affiliations during these years other than Local 777 and the Joint Council. (R. 91-92; Pet. App. 2a.) In 1954, petitioner was indicted by a federal grand jury on charges of conspiring to obstruct the movement of live poultry in interstate commerce by the use of extortion and actual or threatened violence in violation of the Hobbs or Anti-Racketeering Act (18 U.S.C. 1951). (R. 92; Pet. App. 2a.) These charges arose from petitioner's activities on the poultry market in Chicago, where it had been his practice to spend his afternoons after completing his work during the mornings at the offices of Local 777. At a meeting of the membership of Local 777 in October 1954, shortly after petitioner's indictment, the Local was authorized to pay petitioner's legal fees and expenses in connection with the criminal proceedings. In March 1957, petitioner was acquitted of the extortion charges following a jury trial. (Pet. App. 2a-3a.)

The Commissioner of Internal Revenue determined that the amounts paid by Local 777 directly to petitioner's lawyers, which totalled $124,621.45 over four taxable years (R. 95), were income to petitioner, and that petitioner was not entitled to deduct these

amounts as ordinary and necessary business expenses. In petitioner's suit for redetermination, the Tax Court sustained the Commissioner's position (R. 91-98). The court of appeals affirmed (Pet. App. 1a-6a).[2]

The decision below is correct and raises no conflict with other decisions. There is no basis for further review.

1. Whether petitioner incurred the disputed legal expenses in connection with a "trade or business" within the meaning of Section 162(a) is a question of fact. *Higgins* v. *Commissioner*, 312 U.S. 212, 217-218. That question was decided adversely to petitioner by the Tax Court and the court of appeals and thus ought not be reviewed by this Court in the absence of obvious and exceptional error. *Corn Products Refining Co.* v. *Commissioner*, 350 U.S. 46, 51; *Berenyi* v. *District Director*, 385 U.S. 630, 635.

The Tax Court found that the petitioner had no business activity other than that of officer-employee of Local 777, excepting a connection with a phonograph distributing company not pertinent here (R. 97-98), and that his activities at the poultry market "were carried on by him * * * as a 'labor boss' who had influence with the Teamsters Union" (R. 98).

---

[2] In the Tax Court, petitioner's ~~the taxpayer's~~ primary contention was that the legal expenses paid on his behalf by Local 777 constituted a nontaxable gift to him. The Tax Court found that Local 777 did not have a donative intent, but made the payments for its own benefit. (R. 96-97.) In the court of appeals, ~~the taxpayer~~ petitioner abandoned his "gift" contention, and contended only that the amounts in question were deductible as business expenses. (Pet. App. 3a.)

The court further held *(ibid.)*:

> We cannot find from any evidence before us that the latter [poultry market] activities had any bearing upon petitioner's duties as an officer-employee of local 777 which was a union representing the interests of taxicab operators. We also have no evidence which indicates petitioner at any time acted as "labor boss" with any idea in mind of being compensated for such activities. * * *

The findings were sustained by the court of appeals, which observed (Pet. App. 4a), "This record is devoid of any showing that Taxpayer conducted his poultry market afternoon activities in order to produce any income or profit", and further that *(ibid.)* "he reported no taxable income from his poultry market activities and testified that he did not recall having received any such income * * *."

Petitioner never directly contends that these findings are so lacking in support as to warrant a second appellate review. His assertions to this Court (Pet. 16) simply represent an attempt to reargue a question of fact that was decided adversely to him below by reiterating the evidence he considers favorable to his position, without referring to the other aspects of the record that amply support the findings.

2. Contrary to petitioner's contentions, this Court's decision in *United States* v. *Gilmore*, 372 U.S. 39, supports the decision below, and *Commissioner* v. *Tellier*, 383 U.S. 687, rests on a record that materially differs from the evidence in this case. *Gilmore*, of course, holds that deductibility of litigation costs depends on whether the litigation arose in connection

with the taxpayer's profit-seeking activities. In *Gilmore* the Court denied deductions for legal fees incurred by the taxpayer in defending against claims of his wife in divorce proceedings regarding the division of their community property. The issue arose under what is now Section 212 of the 1954 Code (Section 23(a)(2) of the 1939 Code), which allows deductions for expenses incurred "for the production or collection of income" or for "the management, conservation, or maintenance of property held for the production of income." The Court observed that Section 212 deductions are akin to Section 162(a) deductions (Section 23(a)(1) of the 1939 Code) in that both sections require that the expenses have business or profit-seeking origins and also that the prohibition of Section 262 (Section 24(a)(1) of the 1939 Code) against deductions for "personal, living, or family expenses" overlays both sections. 372 U.S. at 44. Thus the deduction in *Gilmore* was denied because the origin of the litigation expense was the taxpayer's marital relationship and not his business or profit-seeking activities, even though the wife's claim went against the taxpayer's holdings in closely held corporations from which the taxpayer derived almost all his income. In the present case the deduction was similarly denied because petitioner failed to show that the criminal charges arose from activities which related to his business as officer of the taxicab local or were activities otherwise intended to produce a business profit to himself or to others. Cf. *Putnam* v. *Commissioner*, 352 U.S. 82.[3]

[3] The courts have uniformly held that the profit motive is the single most significant characteristic that distinguishes a

Commissioner v. *Tellier*, *supra*, is not to the contrary. There the Commissioner conceded the business origin of the activities which gave rise to criminal charges against the taxpayer and his concomitant legal expenses (383 U.S. at 689). The issue in *Tellier*, which was not a basis for the Commissioner's determination in the present case, was whether the Commissioner could deny the deduction for the taxpayer's litigation expenses on grounds of public policy, notwithstanding the Commissioner's concession that the expenses related to the taxpayer's business and were ordinary and necessary within the meaning of Section 162(a) (*id.* at 690). The Court's holding that public policy considerations are not a proper basis for the disallowance of deductions otherwise allowed by Section 162(a) hardly absolves petitioner here from having to prove the business or profit-seeking origins of his activities on the poultry market.[4]

3. The propriety of Local 777 undertaking to pay petitioner's legal fees was not in issue in this case and

---

"trade or business" under Section 162(a) from personal, nonbusiness endeavors. See *International Trading Co.* v. *Commissioner*, 275 F. 2d 578 (C.A. 7); *Wiles* v. *United States*, 312 F. 2d 574 (C.A. 10); *Lamont* v. *Commissioner*, 339 F. 2d 377 (C.A. 2); *Hirsch* v. *Commissioner*, 315 F. 2d 731 (C.A. 9); *White* v. *Commissioner*, 227 F. 2d 779 (C.A. 6); *Dyer* v. *Commissioner*, 352 F. 2d 948 (C.A. 8); *Wilson* v. *United States*, 376 F. 2d 280 (Ct. Cl.).

[4] Petitioner testified that he fell heir to the position of (R. 52) "czar" or "boss of the market", meaning the produce market in Chicago, after the death of the previous "czar", one William J. Hanley (R. 61). While he testified that in his capacity as czar he (R. 61) "consulted" with labor officials about affairs within the market and (*ibid.*) "around the city or each county", he did not suggest to what end, or in whose behalf, the consultations took place.

is irrelevant to a determination of petitioner's right to deduct the legal fees himself (see Pet. 17-18). Those payments were treated as income to petitioner from his employer (Pet. App. 3a; R. 96-97), and petitioner does not challenge that treatment here. The deductibility by an employer of amounts paid as compensation to an employee has no bearing on the deductibility by the employee of his disposition of that compensation. Otherwise the absorption by an employer of any personal expense of an employee, while constituting income to the employee, would be a deductible expense for the employee simply because its cost was a deductible expense for the employer. That result would render meaningless the prohibition of Section 262(a) against the deductibility of personal expenses.[5]

4. Petitioner cannot obtain a deduction (see Pet. 17) because federal law now bars from union office persons convicted of a variety of felonies, including extortion. This provision, adopted as Section 504 of the Labor-Management Reporting and Disclosure Act,

---

[5] The proceedings involving Local 777 were settled prior to trial in the Tax Court (Pet. App. 5a). The basic issue was the exempt status of Local 777 which, once settled (R. 79-80), rendered moot any dispute regarding deductions because the exemption entirely absolved the local from income tax liability. See Sections 501(a) and 501(c)(3), Internal Revenue Code of 1954. Moreover, the Commissioner's settlement of one Tax Court case prior to litigation does not estop him from litigating the same issue with respect to the same taxpayer in later years. *United States* v. *International Building Co.*, 345 U.S. 502. *A fortiori*, no estoppel applies with respect to a different taxpayer.

29 U.S.C. 504(a),* also bars from union office persons convicted of robbery, burglary, arson, murder, rape and assault, among other crimes. Petitioner's rationale would permit union officers to deduct legal expenses in connection with all such criminal charges, irrespective of the relationship between the charges and their union duties, simply because Section 504 bars them from holding office upon conviction. The incidental impact of Section 504 following conviction of a union official of one of the enumerated crimes is indistinguishable from the practical effect on any accused's business affairs upon conviction of a felony followed by a jail sentence. As often as not upon such conviction one must forego his income-producing pursuits, or at least see them suffer a significant deleterious effect. That effect, real as it may be, does not by itself change the character of the crime from personal to business-related.

At all events, even if petitioner's legal theory were sound, it would be of no avail to him. The tax consequences must be assessed according to the state of affairs that existed when the legal expenses were incurred. Cf. *Commissioner* v. *Gordon*, 391 U.S. 83, 96. At that time Section 504 did not exist; the LMRDA was not enacted until 1959, more than two years after petitioner's acquittal. The fact that Section 504(c) applies to convictions obtained before 1959 cannot operate to change the tax consequences of expenditures made in prior years.

5. This case raises no question of discrimination between indigent defendants whose legal expenses are

---

* P. L. 86-257, 73 Stat. 536.

borne by the public through court-appointed counsel and persons who bear the cost of their own defense, as petitioner maintains (see Pet. 19-22). Expenses of defending against charges such as those against petitioner are inherently "personal" within the meaning of Section 262. Indigents are provided with counsel to implement the public interest in the enforcement of the Sixth Amendment; they do not thereby become business expenses to the indigent, and, in all probability, these are not expenses that the indigent would otherwise incur. Petitioner is not being treated in a manner that discriminates against him; it is the indigents who have neither an employer who would pay for their counsel nor other significant means who are being brought into a state of equality with petitioner.[7]

[7] The reference in *Tellier* v. *Commissioner*, 342 F. 2d 690, 696 (C.A. 2), affirmed, 383 U.S. 687, to the situation of indigent defendants is not relevant to petitioner's contention. There, in a concurring opinion, Chief Judge Lumbard merely noted that consideration of the *success* of one's legal defense against criminal charges for purposes of the deductibility of such expenses conflicts with the policy that requires reimbursement of expenses to counsel for indigent defendants irrespective of the success of the defense.

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

MITCHELL ROGOVIN,
Assistant Attorney General.

HARRY BAUM,
LOUIS M. KAUDER,
Attorneys.

OCTOBER 1968.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1968 323443 276